

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 129 OF 2012

BETWEEN

M/S COOL CARE SERVICES LTD..... APPELLANT

AND

NATIONAL SOCIAL
SECURITY FUND.....RESPONDENT

DECISION

CORAM:

- | | |
|---------------------------------|--------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. H. S. Madoffe | -Member |
| 3. Mr. K. M. Msita | -Member |
| 4. Mrs. N. S. N. Inyangete | - Member |
| 5. Ms. B.G.Malambugi | -Secretary |

SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. E.V.A Nyagawa | - Principal Legal Officer |
| 2. Ms. F. R. Mapunda | - Legal Officer |
| 3. Ms. V. S. Limilabo | - Legal Officer |
| 4. Mr. H. O. Tika | -Legal Officer |

FOR THE APPELLANT

1. Mr. Burton K. Mwakisu -Advocate, Burton Law
Chambers
2. Ms. Angela Joseph - Legal Officer, Association of
Citizen Contractors Tanzania
(ACCT)
3. Mr. Gervas Siyingwa - Quantity Surveyor, Cool Care
Services Ltd.

FOR THE RESPONDENT

1. Eng. John K. Msemo – Project Manager, NSSF
2. Eng. K. Mattaka – Principal Officer Projects, NSSF
3. Mr. Hussein M. Meena – Procurement Manager, NSSF
4. Ms. Nafue Nyange – Legal Officer, NSSF

This decision was scheduled for delivery today 24th September, 2012, and we proceed to deliver it.

The appeal at hand was lodged by M/s Cool Care Services Ltd (hereinafter to be referred to as “the Appellant”) against the National Social Security Fund commonly known by its acronym NSSF (hereinafter to be referred to as “the Respondent”).

The Appeal is in respect of Tender No. PA/004/2011-12/HQ/W/20-LOT 2 for the Proposed Heating, Ventilation and Air Conditioning Installation for the Proposed Construction of Kilimanjaro Commercial Complex in Moshi Municipality (hereinafter to be referred to as “the tender”).

According to the documents submitted to this Authority, as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent advertised an invitation to tender vide the Daily News of 30th May, 2012.

Having purchased the Tender Document, the Appellant on 31st May, 2012, sought for clarification from the Respondent vide their letter referenced CCSS/TA/14/12 on some provisions in the NCC Agreement and Schedule

of Conditions of Building Sub-Contract (hereinafter to be referred to as “the NCC Agreement for Sub-Contract Works”) which formed part of the Tender Document.

On 18th June, 2012, the Appellant received a letter referenced NSSF/HQ/T.17/1667/II/194 dated 15th June, 2012, from the Respondent informing them on the clarifications made to the queries raised by tenderers. Having noticed that the said letter did not address the queries raised by them, on the same date the Appellant wrote a reminder urging the Respondent to provide answers to their queries.

On 19th June, 2012, the Appellant received a letter referenced NSSF/HQ/T.17/166/II/223 from the Respondent directing them to visit the Consultant’s office, namely, Arqes Africa and Nosudo Associates or the Respondent’s Procurement Management Unit (PMU) for purposes of viewing the drawings.

Having received no reply from the Respondent with respect to their queries, the Appellant wrote another letter to the former referenced CCSL/TA/21/12 dated

22nd June, 2012, seeking intervention of the Accounting Officer on the matter.

On the same day the Appellant received a letter from the Respondent notifying them that the deadline for submission of tenders had been extended from 29th June, 2012, to 12th July, 2012, to enable the Respondent to address the queries raised by tenderers.

On 26th June, 2012, the Respondent replied to the Appellant's queries vide letter referenced NSSF/HQ/T.17/1667/II/278. The Appellant was dissatisfied with the Respondent's replies and having read the drawings they noted some anomalies. They therefore, submitted a second application for review to the Accounting Officer on 29th June, 2012 vide a letter referenced CDSL/TA/23/12.

On 4th July 2012, the Appellant received a letter referenced NSSF/HQ/T.1667/II/285 from the Respondent containing an addendum correcting the mistakes noted in the BOQ. However, the said letter did not address the issues raised by the Appellant regarding the NCC Agreement for Sub-Contract Works.

Being dissatisfied with the Respondent's reply, on 10th July, 2012, the Appellant submitted an application for administrative review to the Public Procurement Regulatory Authority (hereinafter to be referred as "PPRA").

It should be noted that the correspondence between the Appellant, the Respondent and PPRA, mentioned herein above, took place before the deadline for submission of tenders. The tender opening took place on 12th July, 2012, and the following eight tenders were submitted:

S/ No	Tenderer's Name	Quoted price - Tshs (VAT inclusive)
1	M/s Mollel Electrical Contractors	1,127,584,560.00
2	M/s Ashrea Air Conditioning Ltd	960,107,000.00
3	M/s MAK Engineering Co.	829,708,740.00
4	M/s Cool Care Servics Ltd.	963,968,550.00
5	M/s Unicool E.A. Ltd.	610,363,850.00
6	M/s Remco International Ltd	876,142,684.00
7	M/s Dar Essential Ltd.	950,757,034.35
8	M/s Derm Electrical	1,220,030,202.00

On 9th August, 2012, PPRA delivered its decision, whereby it partly upheld the Appellant's complaints and directed the Respondent to incorporate some of the Appellant's proposals to be part of the contract document as they were found to have merit.

Despite of some of the complaints being upheld in PPRA's decision, the Appellant was still dissatisfied and on 13th August, 2012, filed an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority").

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing, may be summarized as follows:

That, the despite the Appellant's dissatisfaction with some of the provisions in the NCC Agreement for Sub-Contract Works and while their request for administrative

review was still pending before PPRA, the Appellant submitted their tender under protest, which was indicated in writing.

That, it is important for the letter of acceptance to be part of the contract agreement as that would substantiate the relationship between the employer and sub-contractor; since, the contract had to be signed between the Main Contractor and a sub contractor. The absence of the said Letter of Acceptance in the sub contract agreement would cancel the contractual relationship between the Respondent and a sub contractor.

That, all documents forming part of the sub-contract agreement had to be specifically stated, because if they are not clearly itemized any party in the sub-contract agreement may come up with other documents as evidence on certain claims which may not be acceptable by the other party.

That, automatic termination of the sub-contract agreement due to acts committed by the main contractor is unacceptable punishment because neither Clause 18.1

of the NCC Agreement for Sub-Contract Works nor any other clause therein outlined the rights and remedies available to the sub-contractors.

That, Clause 19.2 of the NCC Agreement for Sub-Contract Works infringes the sub-contractors rights in allowing them to go for arbitration against the employer by using the name of the main contractor while knowing that the main contractor might not allow his name to be used if they are in good relationship with the employer. Furthermore, in Tanzania there are no laws which compel an entity to use the name of another entity to institute legal proceedings. That, they want a separate contract to cover their claim in case of default by either the main contractor or the Respondent, and to be allowed to sue in their own name. Thus, the Respondent erred in law by including such a provision.

That, they want a separate clause in the Tender Document which would provide for direct payment of sub-contractors, rather than wait for default to arise.

That, the Respondent's interests have been adequately protected at each stage of procurement by using bid

bond, performance bond, advance payment guarantee, and insurance cover while those of the sub-contractors' rights have been ignored to their detriment.

That, the Respondent erred in law for issuing the NCC Agreement for Sub-Contract Works to be used together with PPRA's Standard Tendering Document for main works (hereinafter to be referred to as "PPRA's Standard Document"). Paragraph (iii) of the preface to the NCC Agreement for Sub-Contract Works requires it to be used together with the NCC Agreement and Schedule of Conditions of Building Contract. Therefore the NCC Agreement for Sub Contract Works cannot be used together with PPRA's Standard Document as the terms and General Conditions of Contract in the two documents are not related.

That, Regulation 115 of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) Regulations of 2005 (hereinafter to be referred to as "GN No. 97 of 2005"), prohibits a procuring entity from using a contract document other than the Standard Document issued by PPRA. Furthermore, the same Regulation requires a procuring

entity to obtain prior approval from PPRA and the Attorney General's Chambers before using a different document from those issued by PPRA. In this instance, the Respondent used the NCC Agreement for Sub-Contract Works without such approvals.

That, the General Conditions of Contract (hereinafter to be referred to as "the GCC") are not among matters to be negotiated with the successful tenderer as per Clause 35.1(c) of the Instructions to Bidders (hereinafter to be referred to as "ITB") for the sub-contracts.

Finally, the Appellant prayed for the following:

- i. that, the Respondent be ordered to issue a standard contract document for sub-contracts prepared by PPRA;
- ii. that, the Respondent be ordered to pay the Appellant costs of the Appeal to the tune of Tshs. 5,120,000/= as per the following breakdown:
 - Cost of filing the appealTshs. 120,000/=

- Advocate's fee..... Tshs. 5,000,000/=;
- and

- iii. to take any other action the Authority deems necessary.

REPLIES BY THE RESPONDENT

The Respondent's documentary and oral submissions as well as responses from questions raised by the Members of the Authority during the hearing, may be summarized as follows:

That, the Respondent is constructing a commercial complex in Kilimanjaro Region and that, in order to complete the construction of the works there was need to engage sub-contractors specialized in various trades who were expected to work under the Main Contractor.

That, the tender process had adhered to the requirements of Regulations 79 to 83 of GN. No. 97 of 2005.

That, the forms of contract documents used in the disputed tender are PPRA's Standard Document and the NCC Agreement for Sub-Contract Works.

That, since there is to-date no standard contract document for sub-contract works issued by PPRA, the Respondent used the NCC Agreement for Sub-Contract Works with some amendments.

That, PPRA had been carrying out various procurement audits and they had never queried the use of the NCC Agreement for Sub-Contract Works, as it has been used by the Respondent in various sub-contract works for a long period. Hence, it was assumed that PPRA had approved the use of the said document. Thus, there was no need of obtaining prior approval from the Attorney General's Chambers.

That, Regulation 95(1) of GN No. 97 of 2005 allows negotiation with the lowest evaluated tenderer on the following:

- i) minor amendments to the special conditions of contract;

- ii) finalizing payment arrangements; and
- iii) clarifying details that were not apparent or could not be finalized at the time of tendering.

That, the proposed amendments by the Appellant in the NCC Agreement for Sub-Contract Works were not disputed and the Respondent believe that the same could be negotiated and agreed upon between the successful tenderer and the Main Contractor under the supervision of the Respondent.

That, it was admitted that the Special Conditions of Contract (hereinafter to be referred to as "SCC") were not included in the Tender Document by the time the same was issued to tenderers.

That, the Appellant does not have complaints on the way the tendering process was carried out up to the date of tender opening. The position is evidenced by the Appellant's self admission in their Statement of Appeal that the anomalies in the BOQ were corrected and that is why they submitted their tender together with other tenderers on 12th July, 2012.

Finally the Respondent prayed for the following reliefs;

- i. the Appeal be dismissed in its entirety;
- ii. the Appellant be ordered to pay the Respondent all direct costs associated with attending this appeal;
- iii. the Appellant be ordered to attend courses on public procurement and building contracts before filing another case on procurement and contract issues to this Authority; and
- iv. any other order that the Authority feels will make the Appellant understand the prevailing laws of building contracts.

ANALYSIS BY THE AUTHORITY

Having gone through the documents and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centered on five main issues, namely;

- whether it was proper for the Respondent to use the NCC Agreement for Sub-Contract Works in conjunction with PPRA's Standard Contract for the main works;
- whether some of the provisions in the NCC Agreement for Sub-Contract Works prejudice the rights of the sub-contractors;
- whether the provisions in the NCC Agreement for Sub-Contract Works, complained of by the Appellant, can be amended and incorporated in the sub-contract document prior to signing of the contract;
- whether it was proper for the Respondent to use the NCC Agreement for Sub-Contract Works without observing legal requirements; and
- to what relief, if any, are the parties entitled to.

Having identified the issues in dispute the Authority noted that two of the above listed issues were introduced

by the Appellant at the appellate level as they were neither part of their complaints submitted to the Accounting Officer nor to PPRA. The said issues are:

- (a) whether it was proper for the Respondent to use the NCC Agreement for Sub-Contract Works in conjunction with PPRA's Standard Contract for the main works; and
- (b) whether it was proper for the Respondent to use the NCC Agreement for Sub-Contract Works without observing legal requirements.

The Authority observes that, the law requires all complaints whose cause of action arose before the coming into force of a procurement contract to be submitted first to the Accounting Officer, then PPRA and thereafter to this Authority. In the Appeal at hand, the Appellant had correctly observed the law, save for the two issues in dispute. The Authority observes further that, since the Appeal was lodged following the Appellant's dissatisfaction with PPRA's decision, it goes without saying that, the grounds of Appeal should strictly be confined to PPRA's decision and not otherwise. It is

the view of the Authority that, had the Appellant deemed it necessary for the two issues to be deliberated upon they should have raised them in their application for review to the Accounting Officer pursuant to Section 80 of the Act and not at the appellate level. In this case therefore, the Authority does not have the mandate to entertain matters which did not originate from PPRA's decision, save for the reliefs prayed for whose original jurisdiction is vested unto this Authority. That said, the Authority's analysis will only address the following three issues:

- whether some of the provisions in the NCC Agreement for Sub-Contract Works prejudice the rights of the sub-contractors;
- Whether the provisions in the NCC Agreement for Sub-Contract Works, complained of by the Appellant, can be amended and incorporated in the sub-contract document prior to signing of the contract; and
- to what relief, if any, are the parties entitled to.

Having so decided the Authority proceeded to resolve them as follows:

1. Whether some of the provisions in the NCC Agreement for Sub-Contract Works prejudice the rights of the sub-contractors

In resolving this issue the Authority focused on the specific provisions in the NCC Agreement for Sub-Contract Works which constitute the basis of this contentious issue. The Authority noted that the Appellant raised the following matters which they claim prejudiced sub-contractors' rights and therefore need to be addressed under this issue:

- Clause 1.2: does not specify the documents forming part of the sub-Contract, which should include the Letter of Acceptance, thus, likely to cause disputes.
- Clause 18.1(a): does not provide for remedies for the sub-contractor in the event the Main Contract is terminated.

- Clause 19.2: does not allow a sub-contractor to go for arbitration in his own name, as he is obliged to use the Main Contractor's name.
- Clause 20.1: requires all payments to the sub-contractor to be made through the Main Contractor, which is likely to cause unnecessary delays.
- The NCC Agreement for Sub-Contract Works does not provide for compensation events for the sub-contractor as it is the case for the Main Contractor.

Having identified the Appellant's main concerns on the NCC Agreement for Sub-Contract Works for the tender in dispute, the Authority proceeded to consider each of them separately as follows:

- (i) Clause 1.2: does not specify the documents forming part of the sub-Contract, which should include the Letter of Acceptance, thus, likely to cause disputes

In analyzing the Appellant's contention, the Authority noted that the said contention comprises of two

proposals for amendment of the Tender Document. Firstly, that the Acceptance Letter should form part of the contract as failure to do so would prejudice the rights of sub-contractors, in that, there would be no contractual relationship between the Respondent and the sub-contractor. Secondly, Clause 1.2(e) of the NCC Agreement for Sub-Contract Works should state clearly which documents form part of the sub-contract as it is the case for Clause 2.3 of the GCC in the Main Contract.

Having summarized the Appellant's main concerns on this point, the Authority reviewed the Respondent's replies as well as PPRA's decision on this particular point. The Authority deems it prudent to point out at the onset that, according to Paragraph 2.0(ii) of their Written Replies, the Respondent stated categorically that, the matters complained of by the Appellant can be addressed during negotiations with the successful sub-contractor. It is in this context that, in their oral submissions the Respondent did not specifically address the issue whether the Acceptance Letter should form part of the contract or not. With regard to PPRA's decision, they held that the Appellant erred in citing Clause 1.2 of the NCC Sub-Contract as it is applicable where there is a discrepancy

or divergence between the documents listed therein. They further held that, "the NCC Sub contract document does not provide for a requirement to include a letter of acceptance as part of the contract document".

In the light of the conflicting positions by the Appellant and PPRA, the Authority agrees in principle with PPRA that the provision cited by the Appellant is not related to their arguments. However, the Authority understands the Appellant's predicament as there is no provision in the NCC Agreement for Sub-Contract Works which specifies the documents forming part of the sub-contract. In the absence of a specific provision to that effect the Authority observes that, PPRA should have addressed the Appellant's concern on merit. It is the view of the Authority that, the Appellant's observation that the documents forming part of the sub-contract should be specified, is valid, in that, Clause 2.3 of the GCC for the Main Contract which is a standard document issued by PPRA contains a clause that echoes the Appellant's concern. It is obvious that there is no harm in inserting such a provision as it brings more clarity to the terms and conditions of the contract. Thus, may be useful in

minimizing conflicts. For purposes of clarity, the Authority reproduces the aforementioned Clause 2.3 hereunder:

“2.3 The documents forming the Contract shall be interpreted in the following order of priority:

- (1) Agreement,
- (2) Letter of Acceptance,
- (3) Contractor’s Bid,
- (4) Special Conditions of Contract,
- (5) Specifications,
- (6) Drawings,
- (7) Bills of Quantities, and
- (8) Any other document listed in the Special Conditions of Contract as forming part of the Contract.”
(Emphasis supplied)

With regard to the Appellant’s contention that the Letter of Acceptance should be part of the documents forming the sub-contract, the Authority is of the considered opinion that the need thereof depends on the process of engaging a sub-contractor as stipulated in the Tender Document. It is an internationally acceptable practice

that, as far as sub-contracts are concerned it is the main contractor who enters into contract with a sub-contractor. The Authority agrees in principle with PPRA that there is no privity of contract between the procuring entity and the sub-contractor. However, the Authority observes that the Appellant's contention has been triggered by the contents of the ITB which is a replica of the ITB for the main contract.

The Authority is concerned that both the Respondent and PPRA did not consider the fact that the contractual arrangement in the main contract is different from that applicable in sub-contracts. It was expected therefore that, the wording of the ITB should have taken cognizance of, amongst others, the privity of contract in the sub-contract. The Authority deems it prudent to point out a few provisions in the Tender Document for the sub-contracts which indicate that there is privity of contract between the procuring entity and a sub-contractor:

- The Tender Document pre-supposes that the tender is invited by the procuring entity and therefore the acceptance is made by the same. This means the offer is made by the sub-contractor and the

acceptance is done by the procuring entity as per Clause 38.1 of the ITB which states as follows:

“The Bidder whose bid has been accepted will be notified of the award by the Procuring Entity prior to expiration of the bid validity period by cable, telex, by registered letter. This letter (hereinafter and in the Conditions of Contract called the “Letter of Acceptance”) will state the sum that the Procuring Entity will pay the Service provider in consideration of the provision and maintenance of the Service(s) as prescribed by the Contract (hereinafter and in the Contract called the “Contract Price”).” (Emphasis added)

- Clause 38.2 of the ITB read together with the Form of Bid entails that once an acceptance is communicated to the successful sub-contractor, a binding contract is formed between the procuring entity and the sub-contractor. The said provisions are reproduced herein below:

Clause 38.2 of the ITB:

“The notification of award will constitute the formation of the Contract, subject to the Bidder furnishing evidence of registration with relevant statutory bodies within the country and furnishing the Performance Security in accordance with ITB Clause 40 and signing the Contract in accordance with sub-Clause 39.2.” (Emphasis supplied)

Form of Bid:

“This bid and your written acceptance of it shall constitute a binding Contract between us.”
(Emphasis added)

The Authority further observes that the above quoted provisions reiterate the position stated under Section 55(7) of the Act that a procurement contract enters into force when communication of acceptance is made.

- Sub-Clauses 1 and 2 of Clause 39 of the ITB indicate that the procuring entity shall send the Agreement to the sub-contractor for signing and thereafter return the same to the former.

- Clause 40 of the ITB requires the successful sub-contractor to furnish a performance security to the procuring entity.

In view of the observations made in the above cited provisions, the Authority is of the considered opinion that there is an urgent need for a specific Standard Tendering Document for sub-contracts to be prepared by PPRA which will address, among other things, the above observations. It is further opined that, in preparing the said document due consideration should be given to the Appellant's request that a Letter of Acceptance be included amongst the documents forming part of the sub-contract.

- (ii) Clause 18.1(a): does not provide for remedies for the sub-contractor in the event the Main Contract is terminated

The Appellant disputes the automatic termination of the sub-contract upon termination of the Main Contract irrespective of the reasons leading to the termination as Clause 18.1 of the NCC Agreement for Sub-Contract Works does not provide any remedy for the innocent sub-

contractor. The Authority noted that, this contention has been modified by the Appellant as the issue before PPRA was that automatic termination of the sub-contract upon termination of the main contract was unfair. PPRA therefore held that, in a sub-contract, privity of contract exists between the main contractor and the sub-contractor. Therefore when the former's contract is terminated, the latter's is automatically terminated as "it is impossible for the sub contract to continue with works because the sub contract depends on the work and structures to be built by the main contractor".

The Authority concurs with PPRA's decision that, this is an internationally acceptable practice, but also agrees with the Appellant that remedies in such a scenario should be provided for as a way of protecting the rights of sub-contractors.

- (iii) Clause 19.2: does not allow a sub-contractor to go for arbitration in his own name, as he is obliged to use the Main Contractor's name

The Appellant disputed PPRA's decision that in the event the main contractor fails or delays to submit the claim for the sub-contract to the Architect, the sub-contractor has a remedy under Clause 19.2 of the NCC Agreement for Sub-Contract Works. The Appellant argued that the sub-contractor's rights are curtailed under the said clause as he is only allowed to go for arbitration using the name of the main contractor. The Authority reproduces the said clause herein below:

19.2 "If the Sub-Contractor shall feel aggrieved by the amount certified by the Architect or by his failure to certify, by failure of the Main-Contractor to include Sub-Contract work in the monthly valuation as referred to in Sub-Clause 19.1 of this Clause then, subject as the Sub-Contractor giving to the Main-Contractor such indemnity and security as the Main-Contractor shall reasonably require the Main-Contractor shall allow the Sub-Contractor to use the Main-Contractor's name and if necessary will join with the Sub-Contractor as claimant in any arbitration proceedings by the Sub-Contractor in respect of the said matters complained of by the Sub-Contractor." (Emphasis supplied)

As it has already been established that in sub-contracts privity of contract exists between the main contractor and the sub-contractor, the Authority observes that, as a general rule, sub-contractors should be allowed to go for arbitration in their own names because they are privy to the sub-contract. The Authority is of the settled view that, the remedy envisaged in PPRA's decision is unnecessarily restrictive and cumbersome, in that, Clause 19.2 is onerous and unreasonable as it requires the sub contractor to seek the Main contractor's approval to go to arbitration using the Main Contractor's name and fails to address the situation where the conflict is between the subcontractor and the main contractor. In such a situation, it is difficult for the sub-contractor proceed to arbitration using the main contractor's name. That said, the Authority concurs with the Appellant that the sub-contractors should be allowed to go for arbitration using their own names.

- (iv) Clause 20.1: requires all payments to a sub-contractor to be made through the Main Contractor, which is likely to cause unnecessary delays

During the hearing the Respondent stated categorically that they do not have a problem with the Appellant's request regarding the mode of payment as they were prepared to pay the successful sub-contractor directly. Much as the Authority commends the Respondent's willingness to do so as they had made a similar commitment in Appeal Case No. 115 of 2011 between the same parties, the Appellant insisted that such an arrangement should not be dependent on the procuring entity's will but should be provided for in the standard tendering document for sub-contracts to be issued by PPRA. The Authority shares the Appellant's concern. However, that should be considered by PPRA as one of the options for payment to sub-contractors when preparing the standard tendering document for sub-contracts.

- (v) The NCC Agreement for Sub-Contract Works does not provide for compensation events for the Sub-Contractor as it is the case for the Main Contractor

As regards the inclusion of compensation events in the sub-contract, the Authority noted that in their decision PPRA had directed the Respondent to include the same as per sub-Clauses 1(a)-(d), (g) – (l), (2) - (4) of Clause 46 of the Main Contract. Much as the Appellant appreciated PPRA's directive, they requested the same to be incorporated in the standard tendering document for sub-contracts to be prepared by PPRA. The Authority observes that PPRA's directive has not taken into account the fact that the NCC Agreement for Sub-Contract Works equally provides for compensation to a sub-contractor in form of loss and expenses under its Clause 16. Thus, implementation of PPRA's decision is only practical if it is harmonized with Clause 16 of the NCC Agreement for Sub-Contract Works.

Having analyzed the first issue, the Authority's conclusion is that, most of the provisions complained of by the Appellant in the NCC Agreement for Sub-Contract Works, are prejudicial to sub-contractors' rights.

2. Whether the provisions in the NCC Agreement for Sub-Contract Works, complained of by the Appellant, can be amended and incorporated

in the sub-contract document prior to signing of the contract

In resolving this issue the Authority revisited PPRA's decision as well as submissions by parties on this particular point. The Authority noted that, Paragraph 9.1 of PPRA's decision had directed the Respondent to do, *inter alia*, the following:

- “(a) Ensure that before the contract is signed between the sub-contractor and the main contractor all activities which are “attendance” of the main contractor to the sub-contractor are included in the sub-contract document.
- (b) To incorporate a clause in the sub contract document to allow the employer to make direct payments to sub contracts in case of default by the main contractor and to deduct the same from future payments due to the main contractor in order to protect the interests of the sub-contractor.
- (c) To incorporate in the sub contract document compensating events to the sub-contractor as contained in the clarification issued

by the accounting officer before the sub contract is signed by the parties." (Emphasis added)

In implementation of PPRA's decision, the Respondent had indicated under Paragraph 2.1(ii) of their written submissions that;

"The Appellant on (sic) his item 1(i) i – vii is proposing some amendments in the provisions within NCC forms of subcontracts. Our response is that these items can be negotiated and amended between the lowest evaluated bidder for the subcontract and the main contractor. NSSF as employer promises to oversee and coordinate the negotiation pursuant to section (sic) 95(1) of Public Procurement Regulations. " (Emphasis supplied)

On their part the Appellant disputes the above positions by PPRA and the Respondent by arguing that, the GCC are not amongst matters that can be negotiated with the successful sub-contractor as per Clause 35.1(c) of the ITB.

In order to ascertain the validity of the above conflicting submissions the Authority deems it necessary to start by reviewing the provision relied upon by the Appellant, which is reproduced hereunder:

“35.1 Negotiations may be undertaken with the lowest evaluated bid relating to the following areas:

- (c) a minor amendment to the special conditions of Contract;” (Emphasis added)

The Authority concurs with the Appellant that, the above quoted provision clearly allows minor amendments to be made only to the SCC and not to the GCC. Having noted that the Tender Document issued by the Respondent did not contain SCC, during the hearing the Respondent was requested by the Members of the Authority to show how they had harmonized the NCC Agreement for Sub-Contract Works and PPRA’s Standard Document for main works, in the absence of the SCC. In reply thereof the Respondent stated that, the SCC were contained in the Tender Document for the main works wherein the harmonization of the two documents was made. The

Authority observes that, the Respondent's statement was not only incorrect but also impractical for the following reasons:

- The Special Conditions of Contract of the main contract does not make any reference to the NCC Agreement for Sub-Contract Works.
- The Respondent's statement is not corroborated by the Tender Document for sub-contracts.
- Duties of the main contractor are distinct from those of the sub-contractors, and therefore cannot be guided by the same provisions.
- The tendering for the main contract and sub-contracts are two separate processes which were conducted at different times. In that case, how can a later document be amended by a preceding one.
- Clause 7.1 of the ITB for the sub-contracts identifies documents forming part of the solicitation documents, which includes, *inter alia*,

the Special Conditions of Contract. However, the Special Conditions of Contract were not there.

Furthermore, in their written submissions the Respondent had indicated that they used “the NCC form of Contract with some amendments”. During the hearing they could not explain how, in the absence of the SCC they had addressed some apparent inconsistencies between the two documents, as exemplified in the following few examples:

Clause in the NCC Agreement for Sub-Contracts	The Content of the Clause which makes Direct Reference to the NCC Main Contract
1.2	Any instruction issued by the Main Contractor and/or the Architect under these Conditions (save insofar as any such instruction requires a variation in accordance with the provisions of sub-clause 13.3, of the Main Contract).
9.3	...The value of all authorized variations shall be determined by the Quantity Surveyor for the time being under the Main-Contract and in accordance with the applicable provisions relating to the ascertainment of prices for authorized variations laid down in the Agreement and Schedule of Conditions of Building

	Contract in use published by the National Construction Council;
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The Authority observes that, the Appellant’s contention that the Respondent should have harmonized the two documents is valid, in that, according to PPRA’s Standard Document the referred Clause 13.3 in the above Table talks about a different subject, namely, insurance. The said Clause 13.3 of PPRA’s Standard Document provides as follows:

“If the Contractor does not provide any of the policies and certificates required, the Employer may effect the insurance which the Contractor should have provided and recover the premiums the Employer has paid from payments otherwise due to the Contractor or, if no payment is due, the payment of the premiums shall be a debt due.” (Emphasis added)

Furthermore, the harmonization of the two documents was necessary, in that, while the NCC Agreement for

Sub-Contract Works refers to an “Architect and a Quantity Surveyor” as persons with some authority in the Main Contract, PPRA’s Standard Document refers to a “Project Manager” .

The Authority further opines that, contrary to the provision of Regulation 95(1)(c) of GN. No. 97 of 2005, the proposed amendments are not minor in nature and do not lend themselves to negotiation between parties as contended by the Respondent.

Having pointed out some of the inconsistencies between the two documents and having established that the Tender Document issued by the Respondent does not contain the SCC, the Authority wonders as to how was the Respondent expected to implement PPRA’s directives in the absence of the SCC. The Authority is of the considered view that, failure to incorporate the SCC is a material omission.

In view of the above findings the Authority’s conclusions on the second issue is that, the provisions in the NCC Agreement for Sub-Contract Works, complained of by the

Appellant, cannot be amended and incorporated in the sub-contract document prior to signing of the contract.

3. To what reliefs, if any, are the parties entitled to

Having resolved the issues in dispute the Authority proceeded to address the prayers by parties. To start with, the Authority considered the Appellant's first prayer that, the Respondent be ordered to issue a standard contract document for sub-contracts as prepared by PPRA. The Authority is of the view that, the Respondent should issue a tender document that addresses the findings articulated in this Decision as well as the requirements of the law. With regard to the Appellant's second prayer for compensation of Tshs. 5,120,000/= being Appeal filing fees and advocate's fees, the Authority observes that the Appellant deserves to be compensated as the Appeal has merit and has been an eye opener to both the Respondent, PPRA and this Authority. Furthermore, the Respondent did not object to the amount requested by the Appellant and therefore the Authority orders the Respondent to compensate the Appellant a sum of Tshs. 5,120,000/=.

The Authority also considered the prayers by the Respondent. The Respondent's first prayer that the Appeal be dismissed is rejected as the Appeal has merit. With regard to the Respondent's second prayer that the Appellant be ordered to compensate the Respondent for the direct costs arising from pursuing this Appeal, the Authority cannot grant it for want of jurisdiction as per Section 82(4)(f) of the Act. According to the afore-cited provision, payment of compensation is confined to tenderers only and not procuring entities. As for third prayer that the Appellant be ordered to attend courses on public procurement and building contracts before filing another case on matters relating to procurement, the Authority observes that, this prayer was uncalled for, as it was evident during the hearing that even the Respondents' themselves need to acquaint themselves with the applicable law. Had the Respondent been well versed with the applicable law and had they taken appropriate action with regard to the sub-contract, the shortfalls detected in their Tender Document by the Appellant and this Authority would not have been there.

The Authority is fully cognizant of the adverse consequences, in that, this decision may delay and disrupt execution of the project entailed in this tender. However, the Authorities' hands are tied in that, observance of the law is paramount and it is indeed its role to ensure enforcement of the same.

On the basis of the aforesaid conclusions, the Authority upholds the Appeal and orders the Respondent to do the following:

- issue a Tender Document that addresses the findings articulated in this Decision as well as the requirements of the law; and
- compensate the Appellant a sum of Tshs. 5,120,000/= being appeal filing fees and Advocate's fees, respectively.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 24th September, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

- 1. MR. H. S. MADOFFE.....
- 2. MR. K.M. MSITA.....
- 3. MRS. N.S.N. INYANGETE.....